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BY ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room CY-B402
Washington, D.C. 20554

Re: ***Notice of Ex Parte Presentation***
Petition of US LEC Corp. for a Declaratory Ruling Regarding LEC Access Charges for CMRS Traffic, CC Docket No. 01-92

Dear Ms. Dortch:

ITC^DeltaCom Communications Inc., d/b/a ITC^DeltaCom, through its attorneys, files this notice of *ex parte* presentation. On February 23, 2004, Jennifer Kashatus and I, counsel to ITC^DeltaCom, and Richard Juhnke of Sprint met with Matthew Brill, Senior Legal Advisor to Commissioner Abernathy, to discuss the above-referenced petition.

During the meeting, ITC^DeltaCom and Sprint urged the Commission to deny US LEC's petition and to apply its ruling fully to the conduct in which US LEC has engaged. ITC^DeltaCom and Sprint underscored that the relevant legal question in this case is not whether the CLEC Benchmark Order prohibited the type of abusive routing practice that US LEC engages in, but whether the CLEC Benchmark Order authorizes US LEC or any other CLEC to charge the benchmark rate for this practice. The benchmark rate did not exist as an FCC-approved rate prior to this decision, and, once created by the FCC, the benchmark rate cannot be used except where and as authorized by the FCC. The CLEC Benchmark Order does not authorize US LEC or any other CLEC to use the benchmark rate for the transit routing of CMRS-originating traffic, and in fact the order and its implementing rule expressly require that the rate reflect all originating access functions. In particular, FCC Rule 61.26(a)(5) requires the benchmark rate to cover ***"all applicable fixed and traffic-sensitive charges"*** (emphasis supplied). Hence, it has never been lawful for US LEC or any other CLEC to use the FCC-approved benchmark rate for the transit routing of CMRS-originating long distance traffic.

In addition, Sprint made the point that sanctioning US LEC's practice would create an uneven playing field between CLECs and ILECs in competing for the handling of originating wireless "8YY" traffic, since CLECs would be able to charge much higher rates than ILECs and give kickbacks to wireless carriers, which ILECs are not allowed to do.

Both parties would like to point out for the record that the Commission previously ruled in *AT&T Corporation v. Business Telecom, Inc.*, 16 FCC Rcd 12312 (2001), that it was unlawful for a CLEC to charge an excessive access rate. In that case, the Commission held (at ¶42) that the CLEC's practice of sharing access revenues with its customers was an indication that the access rate was unlawful, and the Commission correctly applied that ruling on a fully retroactive basis dating back to 1998 even though no pre-existing FCC decision specifically advised the CLEC that its rate might be unlawful. As regards the US LEC petition, the record shows that US LEC has implemented a similar revenue-sharing practice with its CMRS customers, thereby confirming that the access rate it has charged to ITC^DeltaCom, Sprint and other interexchange carriers is unjust and unreasonable in violation of 47 U.S.C. § 201(b). In this case, charging the full benchmark rate for the performance of a mere transit routing function results in a rate that is several orders of magnitude higher than US LEC's underlying costs. US LEC cannot claim protection under the CLEC Benchmark Order because, as the record shows, US LEC's rate does not cover "all applicable fixed and traffic-sensitive charges" as required by FCC Rule 61.26(a)(5).

ITC^DeltaCom and Sprint advised that they have disputed numerous invoices sent by US LEC for the transit routing of CMRS-originating "8YY" traffic and that such invoices now total in the multiple millions of dollars. In the case of ITC^DeltaCom, there is currently more than $3 million in outstanding invoices from US LEC for this unlawful practice. The Commission's ruling should not deliberately or inadvertently give US LEC any openings to initiate or prosecute a litigation strategy against interexchange carriers in an effort to collect such unlawful charges.

The parties discussed whether any ruling by the Commission against US LEC should apply prospectively only. Both ITC^DeltaCom and Sprint urged the Commission to apply its ruling fully to the conduct on hand for reasons stated in previous submissions in this proceeding. The parties underscored that US LEC has charged for services that it does not provide, and that this practice is now and has always been unjust and unreasonable in violation of 47 U.S.C. §201(b).

Please contact me at (202) 955-9676 if you have any questions regarding this filing.

Sincerely,

Robert J. Aamoth

Attachment

cc: Matthew Brill (via email)
Christopher Libertelli (via email)
Scott Bergmann (via email)
Daniel Gonzalez (via email)
Jessica Rosenworcel (via email)
Victoria Schlesinger (via email)
Gregory Vadas (via email)
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